UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARK COUNTY, WASHINGTON; CITY OF VANCOUVER, WASHINGTON; CITIZENS AGAINST RESERVATION SHOPPING (CARS); AL ALEXANDERSON; GREG AND SUSAN GILBERT; DRAGONSLAYER INC.; and MICHELS DEVELOPMENT LLP,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; KEN L. SALAZAR, in his official capacity as Secretary of the Interior; BUREAU OF INDIAN AFFAIRS; KEVIN K. WASHBURN, in his official capacity as Assistant Secretary of the Interior – Indian Affairs; NATIONAL INDIAN GAMING COMMISSION; and TRACIE STEVENS, in her official capacity as Chairwoman of the National Indian Gaming Commission,

Defendants,

and

COWLITZ INDIAN TRIBE,

Intervenor-Defendant.

Case No. 1:11-cv-00278-RWR

Judge Richard W. Roberts

REPLY

Federal Defendants vastly overestimate the scope of their authority. In their Opposition, Federal Defendants object that Plaintiffs wrongly characterized the Supplemental Record of Decision ("ROD") as post-hoc justification and that the cases Plaintiffs cited are therefore inapplicable. Federal Defendants assert that the October 1, 2012 Supplemental ROD "is an entirely new agency action that replaces the 2010 initial reservation determination," and that Federal

Defendants have "inherent authority to reconsider [their] decisions" – apparently whenever and however they please. See Fed. Def. Opp. Mot. Strike, at 4, 6 (Dkt. No. 79).

Federal Defendants cannot engage in post-hoc decision-making for the reasons set forth in Plaintiffs' Motion to Strike, and Federal Defendants definitely cannot supersede a portion of a ROD under judicial review with an "entirely new" agency action without leave of court. The 2010 ROD Plaintiffs challenge is a final agency action, subject to appeal under the Administrative Procedure Act ("APA"). Federal Defendants treat "finality," however, as having little significance. They are wrong to do so. Before final agency action, jurisdiction resides with the agency. Once a decision is final and is challenged in federal court, however, jurisdiction over the action resides with the court. Federal Defendants' inherent authority does not extend to reopening, altering or superseding a portion of a final agency action after a federal court has assumed jurisdiction and after that court denied their request to take the very action they now claim to have taken.

1. Plaintiffs Properly Challenged a Final Agency Action

In the 2010 ROD, the Assistant Secretary represented that "[b]y my signature, I indicate my decision to implement the Preferred Alternative, acquire the Cowlitz Parcel property in trust, and issue a Reservation Proclamation establishing an initial reservation for the Cowlitz Indian Tribe." The Assistant Secretary published his decision in the Federal Register and stated that the land would not be transferred into trust for 30 days to allow parties to seek judicial review of his decision. Notice of Final Agency Determination, 76 Fed. Reg. 377 (Jan. 4, 2011). The 2010 ROD finalized the Secretary's decision to acquire land in trust for the Cowlitz Tribe and set forth the basis for his decision, including the Initial Reservation Determination on which the trust decision was based. See Fed. Def. Opp. Mot. Strike, at 7 (Dkt. No. 79) (explaining that the "final agency action that serves as the basis of Plaintiffs' complaints is the December 2010 ROD"). The 2010 ROD is the "consummation" of

the Federal Defendants' decision-making process through which Federal Defendants definitively determined the rights and/or obligations of the Cowlitz Tribe and Plaintiffs, after public involvement and comment. *See Center for Auto Safety v. National Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006)(describing the criteria used to measure finality).

2. Federal Defendants Ignored the Court's Order

Plaintiffs appealed the 2010 ROD on January 31, 2011, Compl. (Dkt. No. 1), and the Court assumed jurisdiction to review the 2010 ROD. Last July, Federal Defendants sought voluntary remand to fix their Initial Reservation Determination, because they failed to consider material submitted by Plaintiffs and others directly relevant to the Determination. *See* Fed. Def. Am. Mot. Remand (Dkt. No. 58). The Court denied Federal Defendants' motion. Aug. 29, 2012 Order ("ORDERED that the Federal Defendants' Motions for Voluntary Remand and Stay of the Litigation [56, 58] be, and hereby are, DENIED."). Federal Defendants represent in their Opposition, however, that "[t]he remand has now occurred …" Fed. Def. Opp. Mot. Strike, at 10. Federal Defendants claim that the Court "implicitly recognized the Department's ability to undertake additional review." *Id.* at 5.

Federal Defendants ignore the scope of the Court's order. The Court directed Federal Defendants to "file promptly a notice" if they decided before their opposition/cross-motion for summary judgment was due "to rescind or otherwise alter their determination." Aug. 29, 2012 Order, at 3. Federal Defendants did not comply with the Aug. 29 Order – they did not file promptly a notice that they decided to rescind or alter their determination based on their failure to comply with the APA. Instead, they claim to have withdrawn the Initial Reservation Determination portion

of the 2010 ROD and superseded it with a new final decision that they apparently prepared during the remand that the Court refused to grant. Id. at 8.[1]

3. Federal Defendants Do Not Have Authority to Reopen, Supersede or Alter the ROD

The Court did not grant Federal Defendants' requested remand, and Federal Defendants do not have "inherent authority" to take it anyway. There are several reasons Federal Defendants do not have the power they claim.

First, if an agency has the power to alter a final decision under judicial review, it can potentially strip the reviewing court of its jurisdiction, which is limited by Article III. The filing of an appeal of agency action in district court is an event of jurisdictional significance. Courts cannot review agency action until the agency has taken final action. See 5 U.S.C. §§ 702 & 704; see also Bennett v. Spear, 520 U.S. 154, 176–178 (1997) (discussing the requirement of final agency action). A district court reviewing a final agency action "'sits as an appellate tribunal.'" County of Los Angeles v. Shalala, 192 F.3d 1005, 1011 (D.C. Cir. 1999) (quoting PPG Indus., Inc. v. United States, 52 F.3d 363, 365 (D.C. Cir. 1995)). "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58-59 (1982) (per curiam)(emphasis added). Likewise, when a district court assumes jurisdiction over an appeal of a final agency decision, the agency's authority over the decision is divested. Absent authorization

[1] In the 2010 ROD, the Secretary's initial reservation determination was arbitrary and capricious. Nothing that Federal Defendants have done since release of the 2010 ROD changes it. In fact, if the decision on which the Secretary based his trust decision has been superseded, Federal Defendants necessarily have to reconsider the entire 2010 ROD. It is not sufficient that the outcome is the same; the APA requires a reasoned explanation for the decision and the Secretary did not provide one in 2010. The fact that Federal Defendants superseded a portion of the 2010 ROD requires that the 2010 ROD be vacated. Moreover, if Federal Defendants could unilaterally change a decision, they would still have to comply with APA decision-making requirements, including public notice and comment and publication of final decision.

from the Court, Federal Defendants had no authority to supersede a portion of the 2010 ROD and attempt to incorporate by reference a decision that post-dates the decision under review by almost two years.

In fact, the Seventh Circuit has determined that an agency may not unilaterally reopen a proceeding, thereby divesting courts of their jurisdiction. *See Doctors Nursing & Rehabilitation Center v. Sebelius*, 613 F.3d 672, 677-78 (7th Cir. 2010). The question in *Doctors Nursing Center* was whether an agency could divest the courts of jurisdiction simply by unilaterally reopening its proceeding after the lawsuit was filed. The court held that an agency could not, focusing on the potential consequences to its jurisdiction.[2] Jurisdiction is measured at the time of suit. Id. at 677 (citing *Laborers' Pension Fund v. Pavement Maint., Inc.*, 542 F.3d 189, 194 (7th Cir.2008)). "[W]hen one tribunal properly takes a case on appeal, the inferior tribunal transfers authority over the case." Id. (citing *Gao v. Gonzales*, 464 F.3d 728, 729 (7th Cir. 2006). As a consequence, the inferior tribunal must request permission from the appellate court to reassert jurisdiction over the case. Id. Even though the law in question that case – a provision of the Medicare Act – actually established a procedure for seeking remand in the middle of a court proceeding (a provision lacking in this case), the court held that an agency could not unilaterally remand a decision, reasoning that:

> While this provision addresses only the court's power to remand, and not the agency's own authority to reopen its proceedings, it assumes that an agency may not disrupt federal jurisdiction on its own. Otherwise, the remand authority in § 405(g) would serve no purpose: the agency would never need to ask the court for a remand.

[2] The Secretary argued that "as the agency has authority under its regulations, it may reopen its administrative proceedings." Id. at 676. The Secretary also asserted that once the agency "reopens the proceedings, there is no longer a 'final decision' for the courts to review and any suit based on the earlier decision must be dismissed for want of jurisdiction.'" Id. at 676 – 77. The court explained that to accept the Secretary's position would require it to hold that "an agency may always divest the courts of jurisdiction with post-filing reopening and reconsideration, notwithstanding the traditional rule that jurisdiction is determined at the time of filing." Id. The court rejected that position. Federal Defendants implicitly advance the same position to the Court, and it should similarly be rejected.

Id. (emphasis added).

Indeed, this inherent limitation on the agency's authority is precisely why Federal Defendants asked the Court for voluntary remand in July. See Fed. Def. Am. Mot. Remand (Dkt. No. 58). The rule is, while an agency decision is properly within the jurisdiction of the court for review, an agency may not disrupt the court's jurisdiction by reopening or altering a final decision.[3]

There is a second reason that an agency cannot interfere with judicial review – interference with judicial proceedings jeopardizes our constitutional structure by undermining judicial authority. The finality requirement in the APA serves a critical purpose – it preserves the separation of powers in the administrative context. The doctrines of finality and ripeness are closely related; agency action is not "ripe" for judicial review until it is final. See American Petroleum Institute v. E.P.A., 683 F.3d 382, 386 (D.C. Cir. 2012); see also Wheaton College v. Sebelius, --- F.Supp.2d ----, 2012 WL 3637162 (D.D.C. Aug. 24, 2012). The ripeness/finality requirements preserve the proper role of federal courts under Article III by ensuring that courts do not review tentative agency decisions, preventing courts from "'entangling themselves in abstract disagreements over administrative policies, and ... protect[ing] the agencies from judicial interference'" in an ongoing decision-making process. American Petroleum Institute v. E.P.A., 683 F.3d at 386 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967)); see also Sebelius, --- F.Supp.2d ----, 2012 WL 3637162, at *8. The requirement that litigants exhaust federal administrative remedies before seeking judicial review is "'an expression of executive and

[3] Federal Defendants mistake instances where a court – under its authority – decided to remand a final decision to an agency for reconsideration for the facts of this case. For example, Federal Defendants cite to Bowen v. Hood, 202 F. 3d 1211, 1219 (9th Cir. 2000), and City of Los Angeles v. U.S. Dept. of Transp., 165 F. 3d 972, 977 (D.C. Cir. 1999). Both involved a court reaching the merits of the case and remanding the agency decisions to the agencies for reconsideration consistent with the courts' orders. Federal Defendants blink the reality by pretending that the agency and the courts simultaneously have jurisdiction to take action on the same decision. If the Secretary wishes to make a new decision, it can do so only with the permission of the Court through dismissal or remand.

administrative autonomy.'" McKart v. United States, 395 U.S. 185, 194 (1969) (quoting Louis L. Jaffe, Judicial Control of Administrative Action 425 (1965)); see also Pavano v. Shalala, 95 F.3d 147, 150 (2d Cir. 1996) ("Parties are generally required to exhaust their administrative remedies, in part because of concerns for separation of powers."); Sarei v. Rio Tinto, 487 F.3d 1193, 1226 (9th Cir. 2007) ("For courts to act prematurely, prior to the final decision of the appropriate administrative agency, would raise a serious question implicating the doctrine of separation of powers.").

The corollary to the finality principle is that once an agency has taken final action and that action has been challenged in federal court, an agency cannot unilaterally alter the decision because doing so undermines separation of powers. To be sure, an agency can admit error, rescind its decision, and move to have a case dismissed as moot. But it cannot rewrite a portion of a final decision in the midst of litigation and claim that the new explanation is incorporated into a decision made two years prior, without violating the principles the doctrines of finality, ripeness, and exhaustion protect.[4] In explaining the finality requirement, the Supreme Court stated that it "early and wisely determined … not [to] give advisory opinions even when asked by the Chief Executive.

[4] Federal Defendants cite a number of cases to support the proposition that agencies have the authority to reconsider a final decision. Not one of those cases, however, involved agency reconsideration of a final agency action while the action was under review by a federal court. See Trujillo v. Gen. Elec. Co., 621 F.2d 1084, 1086 (10th Cir. 1980) (claim that EEOC had no authority to rescind initial right-to-sue letter and issue new letter and associated deadline in response to a request for reconsideration before judicial review); Dun & Bradstreet Corp. v. U.S. Postal Service, 946 F.2d 189, 193 (2d Cir. 1991) (plaintiff filed takings claim based on alleged property right created by Postal Service's interim decision to refund postage that it later reversed); Friends of Boundary Waters Wilderness v. Bosworth, 437 F.3d 815, 823 (8th Cir. 2006) (federal agency permitted to revise quotas "to correct a major error made manifest by court opinion"); Belville Min. Co. v. United States, 999 F. 2d 989, 997 (9th Cir. 1993) (New Director of Office of Surface Mining reversed initial determination as to mining rights prompting judicial challenge of reversal). In fact, in Mazaleski v. Treusdell, 562 F.2d 701, 720 (D.C. Cir. 1977), the court held that the appellants' rights had been violated by the agency's failure to provide the statutorily required explanation of the grounds for termination, even when the agency provided the explanation after the appellant filed his complaint. The cases Federal Defendants cite stand merely for the proposition that an agency may correct an error after final decision if done so quickly, and there are limits even on that authority. See Mazaleski, 562 F.2d at 720. "Where reasonable time for reconsideration has expired, there is no longer an opportunity to correct procedural error retroactively." Id.

It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 113-14 (1948) (citations omitted and emphasis added).

Federal Defendants ignored the Court's order, assumed authority they did not have, and contorted the law all to avoid rescinding a decision they know violates the APA. Whether motivated by political expediency, a desire to avoid embarrassment, or an aversion to complying with the procedural requirements of the APA, Federal Defendants cannot compromise fundamental constitutional principles and the Court's jurisdiction to try to redeem a deeply flawed decision through illegal means.

Respectfully, for the foregoing reasons, the Court should grant Plaintiffs' Motion to Strike.

Dated: October 29, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012, a copy of the foregoing REPLY was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF. System.

Dated: October 29, 2012

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